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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

~~75-240~~

No. 75-

IN RE JEFFREY R. MACDONALD, *Petitioner*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BERNARD L. SEGAL
Suite 220
536 Mission Street
San Francisco, Calif. 94105
MICHAEL J. MALLEY
1250 Connecticut Avenue
Washington, D.C. 20036
Attorneys for Petitioner

Of Counsel:
DURANT WILLIAMS ESCOTT
412 Law Building
Charlotte, North Carolina

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The Petitioner, Dr. Jeffrey R. MacDonald, respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the denial of Petitioner's Petition for a Writ to compel the District Court for the Eastern District of North Carolina to Transfer his case to the Central District of California under Federal Rule of Criminal Procedure 21(b).

The Order denying the motion to transfer was made and entered on May 30, 1975. The Petition for Writ of Mandamus was filed on July 10, 1975. The Fourth Circuit Court of Appeals denied the petition on July 15, 1975.

OPINION BELOW

The Order of the Fourth Circuit Court of Appeals appears as Appendix A hereto. The Order on Motion to Transfer, made and entered by Judge Franklin T. Dupree, Jr., in the District Court for the Eastern District of North Carolina, appears as Appendix B.

JURISDICTION

The denial of Petitioner's Mandamus petition was entered on July 15, 1975. This petition has been filed within 30 days thereof. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

QUESTION PRESENTED

Is the Writ of Mandamus an available remedy to a defendant in a criminal case whose motion for a change of venue because of hardship has been denied by a District Court which failed to apply the criteria approved by this Court and the result of which will be Petitioner's bankruptcy and other substantial prejudices from which there is no post-trial relief?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice of a court which has jurisdiction.

Federal Rule of Criminal Procedure 21(b):

(a) Transfer in other cases. For the convenience of parties and witnesses, and in the interest of

justice, the court upon motion of the Defendant may transfer the proceedings as to him or any one or more of the counts thereof to another district.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fifth Amendment, providing in part that "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

HISTORY OF THE CASE

In 1970, the Petitioner, Dr. Jeffrey R. MacDonald, a medical doctor, was serving in the United States Army, attached to a Green Beret unit at Fort Bragg, North Carolina. On February 17, 1970, a group of intruders broke into the MacDonald home, stabbed and beat the Petitioner into unconsciousness, and murdered his wife, Colette, and his two daughters, Kristen (age 3) and Kimberly (age 6). Petitioner received a life-threatening wound and was hospitalized for his injuries.

Failing to locate any viable suspects for the crime, Army investigators caused the Petitioner to be arrested and charged on May 1, 1970. Since the nature of the charges required trial by general court-martial, Petitioner's commanding officer ordered the convening of formal proceedings under Article 32 of the Uniform Code of Military Justice (10 U.S.C. § 832). The Article 32 officer, an infantry colonel with thirty years service and substantial court-martial experience, conducted the Article 32 judicial proceedings over a period of five months, including four full weeks of court proceedings.

The Petitioner and the Government were represented throughout by counsel. Chief counsel for the Petitioner throughout the military proceedings was Bernard L. Segal, Esq., who was at that time a partner in the Philadelphia law firm of Segal, Appel and Natali.

During the Article 32 proceedings, the Government was directed to and did in fact present all the evidence known to it. The Petitioner presented a full defense on the charges and himself testified under oath at length and was subjected to cross-examination. During the course of the proceedings substantial evidence was presented which was gathered by psychiatric experts both for the Government and for the Petitioner. Experts for both sides agreed that the Petitioner was "not hiding any evidence" regarding the night his family was murdered. There was also psychiatric testimony that Petitioner was "incapable" of committing the crimes with which he was charged.

Following the conclusion of these judicial proceedings, the Article 32 officer, Colonel Warren Rock, submitted a 90-page report in which he recommended the dismissal of the charges against the Petitioner because they were *"not true"*, and further recommended the investigation of a particular woman, who was identified at the Article 32 investigation because of her possible complicity in the murders. Acting on the recommendation of the Article 32 judicial officer, the officer who had convened those proceedings, Major General Edward Flanagan, dismissed the charges against the Petitioner on October 28, 1970. In December, 1970, the Petitioner was honorably discharged from the Army on hardship grounds and began to re-

build his life after the dual tragedy of the brutal loss of his family and the false accusation of complicity in their deaths.

Approximately six months after his discharge from the Army, the Petitioner moved to Los Angeles California, where he established his permanent residence. Petitioner is still living in the Los Angeles area where he is Director of Emergency Medicine at a major hospital there.

In 1972, Petitioner's chief counsel, Bernard L. Segal, retired from the active practice of law and joined the faculty of Golden Gate University School of Law in San Francisco, California. Concurrently, Professor Segal moved his family and took up permanent residence in the San Francisco Bay area.

From January, 1971, to January, 1972, the Criminal Investigation Division (CID) of the United States Army conducted what it has represented was a complete, extensive and thorough reinvestigation of the murders of the MacDonald family.

In early 1972, the CID requested the United States Department of Justice to seek an indictment of the Petitioner for the murders of his family.

The Department of Justice refused to do so and took no other substantive action on the requests for the indictment of the Petitioner because no evidence existed to support such a charge.

Sometime after June 1972, however, Alfred Kassab, the step-father of Petitioner's deceased wife, who had been a staunch supporter of Petitioner at the Article 32 proceedings, and who testified in his behalf in the strongest possible terms in 1970, inexplicably

turned against the Petitioner. Kassab began demanding that the Department of Justice prosecute Petitioner. He held press conferences concerning his demands and stated publicly that both the Army and the Justice Department had been incompetent in their investigation and prosecution of Petitioner. Kassab repeatedly and persistently threatened the Department of Justice with adverse publicity, Congressional intervention and legal action, should it fail to prosecute Petitioner.

In an attempt to forestall Kassab's criticisms of the Department of Justice, Carl Belcher, Chief of the General Crimes Section of the Department wrote Kassab on January 10, 1974 and stated:

> "... the evidence currently available in this case is insufficient to warrant prosecution against Dr. MacDonald at this time."

On March 10, 1974, the New York Times reported that the Department of Justice was still of the position that there was no basis to prosecute the Petitioner.

Having been informed of the Department's decision not to present evidence against Petitioner to a grand jury, Kassab then undertook to force the Department to reconsider its decision. He did this by publicly accusing the Department of a "cover-up", and by signing "charges" of murder against the Petitioner. These "charges" were delivered personally by Kassab to the Chief Judge, United States District Court for the Eastern District of North Carolina in April, 1974. All of this was accompanied by newspaper publicity generated by Kassab. In response to Kassab's "charges", Chief Judge Butler addressed a letter to the Justice Department requesting comments

and asking what action the Department would take on the "charges".

Shortly after Judge Butler forwarded the "charges" which contained no new evidence against the Petitioner, the Department of Justice determined that a special grand jury would be convened with a view to prosecuting the Petitioner. While the Grand Jury was styled an investigative grand jury, the Petitioner was the only person who was presented to it as a suspect.

This decision of the Department of Justice to convene a special grand jury for the purpose of indicting the Petitioner represented a reversal of the position the Department had held for three years. It was reversed after the filing of the Kassab "charges", although they contained no new evidence.

The Department of Justice officials would not stand by their decision that prosecution of Petitioner was unwarranted, because of their bureaucratic fear that charges of "cover-up" would be made against them. They further feared that, in the post-Watergate era, such accusations would jeopardize their personal job security.

HISTORY OF THE PROCEEDINGS

On January 24, 1975, the Grand Jury returned an indictment against the Petitioner. Petitioner filed a number of pretrial motions, including a motion for transfer under Federal Rule of Criminal Procedure 21(b) on the grounds of convenience and in the interest of justice. That motion sought to have the trial of Petitioner's case transferred from the Eastern District of North Carolina, where the indictment was

brought, to his home district, the Central District of California.

A. Evidence Presented to the District Court

Lengthy evidentiary hearings were conducted on the motion to transfer. The only evidence presented, however, was by the Petitioner. The Government only offered written argument. The facts which were established, without rebuttal, are as follows:

1. That Petitioner is a young doctor, a middle-class professional person, without any income other than what he earns as the Director of Emergency Medicine in a hospital in the Los Angeles area. The record also shows that he does not have unusual assets.[1]

2. That Petitioner's defense will cost him no less than $150,000 and as much as $300,000[2] if trial is held in California.

3. If the trial of the Petitioner's case is not transferred and instead remains in the Eastern District of North Carolina, the cost of Petitioner's defense will be *doubled,* amounting to between $300,000 and $600,000.[3]

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[1] The Petitioner's financial statement, submitted under oath as an exhibit to the District Court, is appended as Appendix C hereto.

[2] The Petitioner's defense in the military proceedings, which were considerably shorter and less complicated than will be his defense to the present indictment, cost the Petitioner, his family and friends, $50,000. At that time he also received considerable free assistance at the Army's expense, which is not available to him now. An anticipated budget for Petitioner's defense was submitted, under oath, to the District Court and is appended hereto as Appendix D. This appendix represents the proposed costs for one month of pre-trial preparation and one month of trial.

[3] See Appendix D for comparative figures.

4. The Petitioner has been offered an extraordinary range of free services, legal and secretarial help, office space and supplies by friends and supporters in the Los Angeles area. Evidence of the above was submitted by affidavit to the District Court. Petitioner has no friends or supporters in North Carolina and would have to pay for all of these services there.

5. The effect of doubling the cost of the Petitioner's defense will be to render him bankrupt.

6. The Petitioner will lose his only source of income if he is compelled to stand trial in the Eastern District of North Carolina. If the trial is held in Los Angeles, the record in the District Court is undisputed that he will be able to continue to perform certain of his administrative duties and to earn a significent portion of his income with which to maintain his defense.[4]

7. The refusal to transfer Petitioner's case to California will result in the loss to him of the principal defense counsel who has continuously represented him since the military proceedings were instituted in 1970. Professor Bernard L. Segal, Esq., has represented the Petitioner throughout his five-year effort to be vindicated of these charges.

In 1972 Segal moved to California to become a Professor of Law in San Francisco. Professor Segal will be unable to represent the Petitioner if the trial, lasting three (3) months, is in the Eastern District of North Carolina. However, Professor Segal will be able to remain as Petitioner's counsel if the trial is held in California.

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[4] These facts were supported by affidavit and testimony. Also see the findings of fact by the District Court, set forth *infra.*

8. The loss of Professor Segal as counsel for the Petitioner will result in an extraordinary delay of the trial of the case. Petitioner will be required to retain new counsel. The Government has represented to the District Court that if one of its assistant counsel were not able to remain in the case, it would take *nine* (9) *months* for another *assistant* counsel to become familiar with the case.

9. The trial of the case in California will not represent a substantially greater inconvenience to the witnesses than will trial in North Carolina. The Petitioner intends to call 110 witnesses, exclusive of character witnesses who may number an additional 25 persons. The Government intends to call as many as 108 witnesses. Of the 218 fact witnesses for both sides, only a small number now reside in the Eastern District of North Carolina. The great bulk of witnesses in the case are Army personnel who have been transferred and have moved throughout the United States and to seven foreign countries since 1970.

10. The trial of Petitioner's case, if it remains in the Eastern District of North Carolina, will be held in Raleigh. The overwhelming majority of the witnesses will have to be flown to the trial. Raleigh, North Carolina, has grossly inadequate and inconvenient airline service. This is to be contrasted to the facts in the record showing that Los Angeles, California, is one of the most accessible cities in the United States.

11. The transfer of the case to the Central District of California will not delay the trial of the case. All pretrial motions in the case are being heard and decided by the District Court of the Eastern District of North Carolina. The dockets in both the Eastern

District of North Carolina and the Central District of California show that criminal cases in both districts are being brought to trial in approximately 3½ months from arraignment. This is better than the national average for all U.S. District Courts. As of July 1, 1975, the Eastern District of North Carolina has only two regular District Judges.

Though the evidence presented by Petitioner, as described above, was uncontroverted on each of these points, and despite the serious constitutional policies involved, the District Judge denied the Petitioner's request for transfer. There was no evidence presented by the Government that the transfer would cause any substantial impediment to the prosecution of its case, contrary to the extraordinary hardship it would place on Petitioner.

B. Opinion of the District Court

In his opinion (Appendix B) the District Court Judge made the following findings of fact which were based upon the evidence presented to the court:

1. That the Petitioner moved to the area of Los Angeles, California, approximately six months after his discharge from the Army and has resided there for the past three and one half years.

2. That the Petitioner is employed as the Director of Emergency Medical Services at Saint Mary's Hospital in Long Beach, California, which is also the Petitioner's place of residence. His residence and employment are both located in the Central District of California.

3. That the Petitioner's annual income is $60,000.

4. That the Petitioner could continue to perform at least some of the duties incident to his present employment if the trial were held in the Central District of California and, thereby, continue earning income.

5. That trial in the Eastern District of North Carolina would be *more* expensive to the defendant in lost income and personal expenses if held in the Eastern District of North Carolina.

6. That a number of defendant's character witnesses (25) reside in the Central District of California.

7. That the murders occurred in the Eastern District of North Carolina.

8. That the documents and records likely to be involved in the case are located in Raleigh, North Carolina *or* Washington, D.C.

9. That Professor Bernard L. Segal, Esq., has been Chief Counsel for the Petitioner for the entire proceedings in this case and Professor Segal now resides in San Francisco, California, where he teaches law at Golden Gate University School of Law.

The District Court judge made the following statements in his opinion which either directly contradicted the unrebutted evidence presented to the court or were based upon facts and data not in evidence:

1. That a substantial number of possible witnesses for the Government and the Petitioner are located in the Eastern District of North Carolina. In fact, the Government has alleged that only *38* of the *218* prospective fact witnesses in the case reside in the Eastern District of North Carolina. In addition to the 218 prospective fact witnesses for each side, the defense

anticipates calling 25 character witnesses, *all* of whom reside in the Central District of California.

2. That Professor Segal would be unable to represent the Petitioner if the trial were held in the Central District of California because of Local Rule 1.3. In fact the District Court was presented with unrebutted evidence from attorneys, in Professor Segal's position, who have been allowed to appear despite Local Rule 1.3. Further, the attention of the District Court was directed to the case of *Munoz* v. *Hauk,* 439 F.2d 1176 (9th Cir., 1971), *cert.den.sub nom. Curtis* v. *Munoz,* 404 U.S. 1059 (1972), wherein Professor Michael Tigar, Esq., a faculty member at a California law school, admitted to practice in another state, was denied the right to represent a defendant in a Federal criminal case because of Local Rule 1.3. The rule was held inapplicable in that case by the Ninth Circuit Court of Appeals.

3. That it would be more convenient for Michael J. Malley, Esq., associate counsel to Professor Segal, to handle the trial of Petitioner in Raleigh than Los Angeles. This conclusion totally ignores the evidence that Malley, because of his inexperience in criminal law and his close personal relationship with the Petitioner cannot and will not assume the role of Chief Counsel to replace Professor Segal. The statement further ignores the plain evidence presented to the court that, though more expensive, it is more convenient to fly from Washington, D.C. to Los Angeles, California than it is to fly from Washington, D.C. to Raleigh, North Carolina.[5]

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[5] The relative accessibility of Raleigh and Los Angeles to Washington, D.C. is discussed at length in footnote 41, *infra.*

4. That Raleigh, North Carolina is more accessible than Los Angeles, California. The District Court Judge made a finding that the air transportation facilities in Raleigh, North Carolina were comparable to those of Los Angeles, which is one of the most significant air terminals in the world. This finding totally contradicts the facts. In a supplemental memorandum filed with the District Court, Petitioner established that official airline schedules show four (4) pages of scheduled flights to Raleigh-Durham airport. It also shows thirty (30) pages of flights to the airports for the Los Angeles metropolitan area.

5. That the per-judge caseload of the Central District of California (221) is "considerably higher" than that of the Eastern District of North Carolina (154). This conclusion was based upon 1974 when there were three (3) District Court judges in the Eastern District of North Carolina. However, on July 1, 1975, Chief Judge Butler retired without replacement, reducing the Eastern District of North Carolina to two (2) judges. And, these two judges now have a per-judge caseload of 231 cases, considerably *higher* than that of the Central District of California.[6]

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[6] By comparison, the Central District of California has 17 judgeships. This fact points up another factor *ignored* by the District judge in his consideration of relative docket conditions: The involvement of one of the two judges in the Eastern District of North Carolina in the extended trial of this complex case will unnecessarily and seriously disrupt the conduct of judicial business in that district. The trial of this case in the Central District of California will have little or no effect on the conduct of judicial business in that district.

6. That Petitioner's estimate for the length of trial is unrealistic.[7] The Court may judge for itself the approximate length of a trial, where there has been substantial pre-trial publicity spanning five years and there will be at least 218 fact witnesses and 25 character witnesses called to testify at trial. The Article 32 proceedings in the Army consumed over four full weeks of proceedings to hear slightly over 60 witnesses. And, it should be noted that the military judicial proceedings were in session a full eight hours each day.

7. That Petitioner had not retained local counsel. To the contrary, Mrs. Durant Williams Escott, Esq., of Charlotte, North Carolina, was retained by Petitioner, and appeared at the evidentiary hearings on this motion and additional pre-trial matters.[8]

Finally, the District Court judge gave grossly inadequate or no consideration whatsoever to these significant aspects of the uncontroverted evidence in this case:

1. Though the District Judge did consider expense to the Petitioner, he gave no weight *whatsoever* to the uncontroverted showing that trial in the Eastern District of North Carolina would result in Petitioner's personal bankruptcy.

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[7] Though treated lightly by the District Court, the question of the length of the trial is of *critical* importance to a proper evaluation of Petitioner's arguments. The difference between a one month trial and a three month trial is vast for a person of Petitioner's means. He wil be deprived of all income throughout the trial and must engage counsel for a lengthy trial. It is interesting to note that the Government has consistently revised upward its estimate of the length of trial of this case.

[8] Mrs. Escott was admitted by the District Court judge *himself* for the purpose of serving as local counsel to the Petitioner.

2. The District Court judge not only erroneously concluded that Professor Segal would not be able to represent the Petitioner in the Central District of California but also completely ignored the unrebutted evidence that, under present conditions, Professor Segal would be required to withdraw from the case if trial were held in the Eastern District of North Carolina.

3. The Petitioner has been offered free housing, feeding and transportation for witnesses and substantial free legal, secretarial and clerical services in the Central District of California. He will have to pay for all these services and facilities in the Eastern District of California. The court's comment that the facilities of local counsel would be made available totally ignores the fact that such services and costs would have to be bought and paid for while they are (including the services of local counsel) available for free to Petitioner in Los Angeles.

4. This is the second time which defendant has been required to vindicate himself of these charges. In 1970, it cost the Petitioner $50,000 to defend himself. This was in addition to the numerous services which were provided free by the Department of the Army. This important and unique factor received no consideration whatsoever from the district Court.

The Petitioner filed a Notice of Appeal from the above order to the United States Court of Appeals for the Fourth Circuit on June 2, 1975. On motion by the Government the Court of Appeals dismissed the appeal on July 1, 1975, as having been taken from a non-appealable order. Petitioner has sought review of that dismissal by Petition for a Writ of Certiorari to this

Court which was filed on July 31, 1975. (No. 75-173). On July 10, 1975, Petitioner filed a Petition for a Writ of Mandamus with the Court of Appeals for the Fourth Circuit. The petition was denied on July 15, 1975 after summary consideration. Petitioner now seeks review by this Court of the denial of his Petition for a Writ of Mandamus by way of this Petition for Writ of Certiorari, in order (1) to prevent denial of Petitioner's due process rights; and, (2) to assure that, if Petitioner is required to go to trial on these very serious charges, that it will take place without needlessly forcing him into bankruptcy and with the full assistance of and representation by his Chief Counsel of five years standing.

REASONS FOR GRANTING THE WRIT

I. AN ORDER DENYING A MOTION FOR CHANGE OF VENUE, IN THE FACE OF UNCONTROVERTED EVIDENCE THAT SUCH A DENIAL WILL UTTERLY BANKRUPT THE PETITIONER AND DEPRIVE HIM OF EFFECTIVE ASSISTANCE OF COUNSEL, SHOULD BE REVEWABLE BY MANDAMUS UNDER 28 U.S.C. § 1651

The issue presented by the instant petition is one of paramount importance to defendants in federal criminal cases all over the nation. That issue is whether a defendant, charged with a serious offense, which will require a protracted trial in a District Court distant from his home and job, and having only limited financial means with which to defend himself, can obtain meaningful relief from the denial of his motion for a change of venue by a District Court which refused to apply the applicable criteria in a motion based upon hardship to such an extreme degree as to amount to a denial of due process.

The facts of the instant case are illustrative of the problem. Dr. Jeffrey MacDonald, the Petitioner, moved for a transfer of his case from the Eastern District of North Carolina to the Central District of California, the district of his residence. Despite unrebutted proof that denial of the transfer motion would cause the defendant *extreme* hardship, the District Court denied the motion. Seeking review of this denial, the Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. When the Court of Appeals dismissed the appeal as being from a non-appealable order, Dr. MacDonald petitioned for a writ of mandamus. The petition was filed on July 10, 1975 and was denied without hearing or argument on July 15, 1975 upon *summary* consideration.

The present case dramatically illuminates the dilemma of an increasing number of defendants in Federal criminal proceedings. The Government has the dual advantage of choosing, within certain broad guidelines of the statute of limitations and the various venue statutes, both the time[9] and the place of the prosecution. The broad discretion invested in the Federal prosecutor, on one hand, is not balanced by any protection to the Federal defendant from an oppressive choice of venue beyond the largely unreviewed discretion of a District Court judge.

Such a state of affairs is unacceptable when considered in light of the fact that this dilemma will affect increasingly larger numbers of Federal defendants. The increasing mobility of our society is a matter of common knowledge. Americans not only move their

[9] It has repeatedly been held that there is no right to a speedy indictment by the government. *United States* v. *Marion,* 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

residences[10] today more than ever before, but they move about the country on business and pleasure more than any nation at any time in history.[11] The migration means an ever increasing number of persons who will be charged with crimes which were committed in districts other than those where they reside or will, by the time an indictment is returned, have moved their residence out of the district.[12]

In each situation of this sort, the defendant will be required to defend his prosecution in a forum distant from his home, family and friends. The extreme hardship which may result even troubled the drafters of the Constitution. They were vexed by a similar practice employed by the English[13] and, as a result, constitutionally guaranteed defendants a trial in the vicinage of the crime.

This guarantee, conceived in 1789, was meant to protect defendants from being tried in places distant from their homes. In the modern context, however, the defendant's residence and the vicinage of the crime will sometimes be different. It is clear that what the authors of the Constitution considered paramount was

[10] Official Bureau of Census statistics show that, during the years 1970-1973, 26.2% of the population changed homes.

[11] According to statistics provided by the Environmental Protection Agency, the increase in total mileage of passenger car travel has tripled from 249,600,000,000 miles in 1940 to 954,000,000,000 miles in 1971.

[12] Any one of the millions of tourists who visited our national parks in the last year could find themselves in a parallel situation merely because they chose to spend their vacation on a Federal reservation.

[13] The Declaration of Independence complains that colonists were transported by the Crown "beyond Seas to be tried for pretended offenses."

trial near the place of the accused's residence so that he would have the support of friends and family and so that he could continue with his employment to pay for his defense.[14]

A. Inadequacy of Existing Judicial Remedies Other Than the Extraordinary Writ of Mandamus

Ideally, of course, prosecutorial abuses of power in the selection of venue should be correctable by the District Court upon a proper motion for transfer. This was doubtless the intent of this Court when it approved the 1966 amendment to Federal Rule of Criminal Procedure 21(b) which authorizes transfer to any district upon motion of the defendant in the interest of justice. Such is not the case, however. This inability of defendants to obtain relief in the District Court is due largely to the fact that administration of the transfer rule relies upon antiquated principles.

It appears to be the rule of thumb in District Courts that change of venus should be more, rather than less, difficult to obtain in criminal cases than in civil cases. Put more precisely, a general rule which has been invoked by District Courts in denying transfer motions is that, "a criminal prosecution should be retained in the original district." *United States* v. *Wolfson,* (S.D.N.Y., 1967) 269 F.Supp. 621, 624; *United States* v. *United States Steel Corp.,* (S.D.N.Y., 1964) 233 F.Supp. 154, 157.

[14] Commentators have long supported this view of the Sixth Amendment guarantee: "the dangers the framers sought to guard against were clearly perceived. It must not be forgotten that the sixth amendment was adopted in the wake of a recent history of forced deportations to distant places for trial. In the colonial period the trial by a local jury was emotionally and outspokenly defended as a right bestowed by Magna Charta and as a free man's best protection against despotic government and the economic and physical hardship occasioned by trial far from home. Early provisions which required trial where the crime was committed would also, in an age of restricted travel and mobility, in effect decree trial at the defendant's home . . ." Comment, *Multi-Venue and the Obscenity Statutes,* 115 U.Pa.L.R. 399, at 413 (1967).

The problem appears to be that the District Courts, are preoccupied with the outdated notion that venue must remain in a place where the offense was committed.[15] Yet, it is clear that the opposite was intended by the 1966 amendment to Rule 21(b). It was intended to do away with the "strait jacket" imposed by this concept which has now been outmoded by modern life. Just as there is no independent significance attached to the mere fact that a corporate defendant's home office is located elsewhere,[16] in fact, no valid reason exists any longer to give independent significance to the mere fact that the crime occurred in one place[17] (once the defendant has waived his constitutional right to trial there).

The District Courts have been hampered, however, by the lack of real guidance available to them on the change of venue issue. *United States* v. *Luros,* 243 F.Supp. 160 (D.C. Iowa 1965) cert. den. 382 U.S. 956 (1966), is a case in point. There an obscenity

[15] In the words of the District Court in *United States* v. *Olen* (D.C.N.Y. 1960) 183 F.Supp. 212: "Had the bulk of the charged criminal acts taken place in this district, I would not hestitate in refusing a transfer."

[16] See *Platt* v. *Minnesota Mining and Manufacturing,* 376 U.S. 240, at 245-246 (1964).

[17] Interestingly, the government urged in this case that the District Court *weigh,* in balance against the Petitioner's impending bankruptcy and loss of counsel: *"The robbing of a district's rightful jurisdiction of a case."* (*Response to Motion to Transfer,* p. 11.)

prosecution against a California corporation was commenced in District Court in Iowa. The District Court was required to weigh the substantial burdens to the defendants of transporting materials, counsel, parties and expert witnesses to Iowa, of engaging office and housing for the duration of the trial. And, the court was also to consider the burden to the defendant corporation of losing its officers for the duration of the trial. Against these interests were some equally substantial interests of the government, of unknown judicial weight. Yet, in its duty to balance these substantial interests, the only guidance available from this Court is the bare approval by way of dictum, of a list of ten factors in the case of *Minnesota Mining and Manufacturing* v. *Platt, supra,* 376 U.S. at 243-244 (1964).

The absence of any definitive statements by this Court of the important and substantial policies underlying the changing of venue in criminal cases has left the District Courts floundering upon this issue. The District Court in the instant case was in just such a dilemma. Since the only "significant" connection with the Eastern District of North Carolina is that the crime occurred there, it must be concluded that it was the District Court's apparent fixation upon this single factor which caused it to ignore, among other things, Petitioner's uncontroverted showing that denial of transfer would render him bankrupt and deprive him of the assistance of his chief counsel of five years standing. If such a result is possible, there can be no question that guidance from this Court is necessary to clarify these standards, and their administration.[18]

Whatever the situation in the District Courts, it is apparent that guidance will not come through *direct appeal* to the Courts of Appeals. The several Courts of Appeals have consistently held that orders denying transfers in criminal cases are not final orders within the meaning of 28 U.S.C.§ 1291 and, therefore, not appealable.

Defendants must, therefore, wait until after trial to challenge a District Judge's exercise of discretion in denying a motion to transfer under 21(b). The futility of this remedy is well illustrated by Professor Charles Wright, who states in his treatise on Federal procedure and practice:

> "A refusal to transfer is reviewable on appeal from a judgment of conviction, but the stated standard is that the decision of the trial court will stand unless the refusal to transfer was a clear abuse of discretion. *In no case has a final judgment been reversed on this ground.*" 1 Wright, *Federal Practice and Procedure* (Criminal) § 347 (1969). (Emphasis added.)

Further, requiring a defendant to wait until after trial ignores two critical ramifications of an improper denial of a motion for transfer under Rule 21(b):

(1) By the time his conviction has become final the defendant has already *irreparably* suffered the

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[18] Of crucial importance is the need for an interpretation of the 1966 amendment to Rule 21(b) adopted by this Court. So far as Petitioner can determine there have been no decisions giving effect to this new, far-reaching change in the rules governing criminal venue which calls for transfer "in the interests of justice."

severe economic and/or personal loss which can be wreaked by such an improper denial; and,

(2) The defendant who is ultimately acquitted finds his victory a Pyrrhic one in view of the irreparable cost he has borne to prove his innocence.

The instant case, in truth possibly *sui generis* in American law, combines both of these factors. There is a high likelihood that the defendant will be ultimately acquitted upon trial by jury. (After four weeks of formal judicial proceedings under Article 32 of the Uniform Code of Military Justice (10 U.S.C. § 832), for the same charges Petitioner now faces, the Army investigating officer found the charges to be "not true.") Further, the Petitioner has presented uncontroverted evidence to the District Court that trial in the Eastern District of North Carolina will render him bankrupt, deprive him of his Chief Counsel of five years standing and substantially impede the conduct of his defense. Thus Petitioner, facing trial on an indictment for a triple homicide, begins the ordeal with the knowledge that he will lose his Chief Counsel and will be rendered bankrupt in proving his innocence a second time. Yet, in the face of this adversity, the Petitioner is told that our system of jurisprudence can provide him no relief whatsoever.[19]

3. In the absence of a decision by this Honorable Court clarifying its use, the extraordinary remedy of Mandamus is currently unavailable or inadequate to provide a remedy for the Petitioner.

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[19] Interestingly, Petitioner only faces this burden because he asserts his innocence of the charges. If he desired to plead guilty, transfer to do so in his home district would be granted as a matter of course under Federal Rule of Criminal Procedure 20(b).

It is apparently the rule in the Second,[20] Fourth,[21] Fifth[22] and Sixth[23] Circuits that mandamus will not lie to review the denial of a motion to transfer in a criminal case. The Seventh Circuit has granted a mandamus reversing a denial of a motion to transfer by a District Court.[24] But, the decision in that case was twice vacated by this Court.[25] Though this Court has reviewed issues closely related to availability of mandamus, it has specifically declined to answer that question.[26]

The reluctance of the Courts of Appeals to exercise their mandamus power on transfer issues, is a matter of record. Judge Friendly's concurring opinion in *A. Olnick and Sons* v. *Dempster Brothers, Inc.*, 365 F.2d 439 (2d Cir. 1966), sums up the attitude well:

> "In the fifteen years since this court first announced willingness to consider such applications, *Ford Motor Co.* v. *Ryan*, 182 F.2d 329 (2d Cir. 1950), we have never granted one. But even so dismal a record naturally does not prevent counsel from accepting our invitation . . ." 365 F.2d at 446 (1966).

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[20] *United States* v. *Garber*, (2nd Cir. 1969) 413 F.2d 234.

[21] *U.S.* v. *Foster*, (4th Cir. 1961) 296 F.2d 249.

[22] *Miller* v. *Connally*, (5th Cir. 1965) 354 F.2d 206.

[23] *Rathke* v. *Picard*, (6th Cir. 1960) 283 F.2d 945, *cert. den.* 375 U.S. 907, 84 S.Ct. 199, 11 L.Ed.2d 147.

[24] *Minnesota Mining and Manufacturing* v. *Platt*, (7th Cir. 1963) 314 F.2d 369; *Minnesota Mining and Manufacturing* v. *Platt*, (7th Cir. 1965) 345 F.2d 621.

[25] *Platt* v. *Minnesota Mining and Manufacturing, supra*, 376 U.S. at 240. *Platt* v. *Minnesota Mining and Manufacturing*, 382 U.S. 456, 86 S.Ct. 643, 15 L.Ed.2d 522 (1966).

[26] *Platt* v. *Minnesota Mining and Manufacturing, supra*, 376 U.S. at 244.

It is apparent that a Petition for Writ of Mandamus to a Court of Appeals for a criminal defendant, no matter how erroneous the District Court's denial, is presently an exercise in futility.

4. There should be established a new standard for mandamus review of transfer issues where the order of the District Court amounts to a denial of Due Process.

It cannot be doubted that this Court has long recognized the need to guard the rights of Federal defendants to fair decisions in regard to the issue of venue. As early as 1905, this Court spoke out strongly against the laying of venue in a distant and inconvenient forum in the case of *Hyde* v. *Shine,* 199 U.S. 62, 25 S.Ct. 760, 50 L.Ed. 90 (1905). Though unable to order the transfer of that case, the Court spoke in unmistakable language regarding its feelings on the issue of venue:

> But we do not wish to be understood as approving the practice of indicting citizens of distant states in the courts of this District, where an indictment will lie in the state of the domicil of such person, . . . *To require a citizen to undertake a long journey across the continent to face his accusers,* and to incur the expense of taking his witnesses and of employing counsel in a distant city, *involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction. Id.,* 199 U.S. at p. 78. (Emphasis added.)

The [illegible]ability and fundamental importance of the concepts underlying the laying of venue in criminal cases was reaffirmed in *United States* v. *Johnson,* 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236 (1944), in which

Justice Felix Frankfurter, writing for the majority, stated:

> [Venue matters] touch closely the fair administration of criminal justice and the public confidence in it, on which it ultimately rests . . . *Questions of venue in criminal cases,* therefore, are not merely matters of formal legal procedure. They *raise deep issues of public policy in light of which legislation must be construed.* 323 U.S. at 276 (Emphasis added).

These cases and two subsequent decisions, *Johnston* v. *United States,* 351 U.S. 215, 76 S.Ct. 739, 100 L.Ed. 1097 (1956) and *United States* v. *Cores,* 356 U.S. 405, 78 S.Ct. 875 2 L.Ed. 873 (1958), reflect the efforts of this Court, prior to the enactment of the 1966 amendment to Rule 21(b), to reconcile the concepts of fairness and due process within the cramped confines of traditional venue statutes and the literal language of the Constitutional guarantee of the Sixth Amendment. Mr. Justice Douglas' strenuous dissent in *Johnston* v. *United States, supra,* graphically points out the issues raised by such an approach:

> . . . the boys in the present case suffer comparably [with the colonists sent abroad for trial]. For their defiance of their local boards they are sent to distant places for trial where they have no friends, where they are unknown, and to which all the witnesses must be transported. Congress would have the power to fix venue there. But it has not done so unambigously. . . . I would read the statute with an eye to history and try the offenders at home where our forefathers thought that normally men would receive the fairest trial. *Id.,* 351 U.S. at p. 224 (Douglas, J., dissenting).

It is apparent that this Court determined to cure this situation by the adoption of the 1966 amendment to Rule 21(b), which allows the laying of venue in any district in accordance with convenience and the interest of justice. It would be ironic indeed if, after this Court has taken such major steps in order to protect Federal defendants from oppressive venue conditions, that the very liberality which it has sought to promote was allowed to be defeated by the utilization of antiquated standards and concepts by the District Courts.

There is a compelling need for this Court to once again assert its interest in this important area and to vitalize the protection which it has attempted to afford defendants from oppression through venue. It is appropriate at this time for this Court to openly recognize that venue questions can, under appropriate circumstances, affect a defendant's right to fundamental due process. Where the burden of defense in the distant forum is so great or will have such disastrous consequences on the defendant's actual ability to defend himself, there can be no question that the policies underlying the due process guarantee are strongly implicated.

Further, in order for such a pronouncement to be meaningful to the Federal defendant, it is necessary for this Court to clarify the remedy available for review of the improper denial of a transfer motion. The extraordinary remedy of mandamus can, with clarification of its role, be just such a remedy.

The evolution of the use of the extraordinary writ in the Ninth Circuit Court of Appeals provides a possible guideline for such a clarification. Taking together two prominent mandamus cases from the past

two decades,[27] it appears that the test which has evolved in that Circuit for the use of mandamus is a three-fold one:

(1) the degree to which the decision of the District Court can be questioned;

(2) the presence of exceptional or extraordinary circumstances which will result in a grave miscarriage of justice to the petitioner;

(3) the degree to which, if at all, the impending miscarriage can be corrected by post-trial appeal or other ordinary remedies.

Placed in the context of the instant issues this will mean that a petitioner seeking to gain review of the denial of a 21(b) motion for transfer must:

(1) show palpable error in the District Court decision; that is, error on the face of the decision such as refusal to consider one of the *Platt* factors, etc.;

(2) show that the wrongful denial will cause the petitioner an injury amounting to a denial of due process, a grave miscarriage of justice;

(3) show that the injury caused petitioner is of a nature that it cannot be remedied after trial. (Petitioner has already established to this Court that there are no alternative pretrial remedies on transfer issues.)

Only through an unequivocal decision of this Court establishing that, under certain circumstances, a defendant is entitled to transfer under Rule 21(b), and the firm establishment of an appellate remedy pro-

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[27] *Kerr* v. *United States District Court*, 511 F.2d 192 (9th Cir. 1975); *Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324 (9th Cir. 1961).

viding meaningful pretrial review, can the rights which this Court has sought to firmly establish in its approval of the 1966 amendment to Rule 21(b) be guaranteed.

It must further be noted that this case is a particularly appropriate one for the decision of the instant issues. The facts of this case are clearly and unequivocally established at the District Court level. Many of them are supported by specific findings by the District Court judge. The issues presented were fully briefed and argued below. The utter failure of the District Court judge, in the face of uncontroverted evidence, to fully consider the two most important factors presented by the defendant constitutes gross error and abuse of discretion. Finally, the issues raised below do not even present a close question. With the sole exception of the place of the crime, there was no evidence before the District Court which in any way showed that any *Platt* factor favored trial in the Eastern District of North Carolina. For this reason, this case also presents this Court with the opportunity to finally clarify that the place of the offense should no longer be considered as having independent weight but should be evaluated as it affects the weight of convenience.[28]

There can be no question that the issues presented herein deal with rights which cannot be otherwise guaranteed to those who need them most. The wealthy and the indigent have their own or the government's resources at their disposal for their defense in a distant forum. It is only the middle class defendant who,

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[28] *Platt* v. *Minnesota Mining and Manufacturing, supra,* 376 U.S. at 245-246.

though presumed innocent, may be rendered bankrupt in defending a wrongful prosecution in a distant district far from home, job, friends and family. The tragedy is one which will continue to occur to Federal defendants, as it has the Petitioner, until this Court clarifies the proper application of its own rule.

II. AN ORDER DENYING A MOTION FOR A CHANGE OF VENUE. IGNORING THE UNCONTROVERTED EVIDENCE THAT SUCH A DENIAL WILL UTTERLY BANKRUPT THE PETITIONER AND DEPRIVE HIM OF EFFECTIVE ASSISTANCE OF COUNSEL. IS AN ABUSE OF DISCRETION REQUIRING THE ISSUANCE OF THE EXTRAORDINARY WRIT OF MANDAMUS.

The standards for the exercise of a District Court's discretion on a motion to transfer were established in the case of *Platt* v. *Minnesota Mining & Manufacturing Co., supra,* 376 U.S. at 243-244, where this Court approved an enumeration of ten factors which should be weighed in balancing the inconvenience and determining the interests of justice:

1. location of the Petitioner
2. disruption of Petitioner's affairs
3. expense to the parties
4. location of counsel
5. relative docket conditions
6. relative accessibility of alternative forums
7. locations of possible witnesses
8. location of documents and records likely to be involved
9. location of the events in issue
10. other special elements or circumstances

Petitioner has made an overwhelming showing under these factors. Further, careful examination reveals

that there are *no significant* ones which weigh against transfer. The overwhelming balance lies in Petitioner's favor.

1. Location of Petitioner; Disruption of Petitioner's Affairs; Expense to the Parties:

Failure to Transfer This Case Will Bankrupt the Petitioner

After the military proceedings in 1970 against the Petitioner were dismissed because the charges were *"not true"*, he moved to Los Angeles, in the Central District of California. He has resided there now for more than three and one-half years. He is the Director of Emergency Medicine in a major hospital there; owns a home in that District; and, his widowed mother also lives there.

In the final Seventh Circuit decision in *Platt* v. *Minnesota Mining & Manufacturing Co.*, 345 F.2d 621 (7th Cir. 1965), the court pointed out that the proper weight to be given to the residency of the defendant is determined in light of its effect upon the convenience in handling the case. *Platt, supra,* at 682. Here, the impact of the Petitioner's residence, which is 3000 miles from the forum in which the trial is scheduled, is enormous and cannot be lightly dismissed.

The trial of this case cannot be other than lengthy. Estimates in the District Court varied from six weeks (the Government's latest upward estimate) to three months (Petitioner's estimate) for the trial of this case.[29] Petitioner will be required to be absent from

[29] By way of comparison, the Article 32 proceeding, where the evidence and the issues were considerably simpler, consumed four full weeks of in-court sessions. (In the finest military tradition, the Article 32 was convened at 8 a.m. and recessed at 5 p.m.) The

his home and professional duties for a twelve week period. If the trial were to be held in Los Angeles, the Petitioner would be able to continue in his administrative capacity at St. Mary's Hospital and thus continue earning income throughout the trial. The directors of the hospital have confirmed the viability of this arrangement. Further, this point was supported by a specific finding of fact to that effect by the District judge.

If, however, the trial is held in the Eastern District of North Carolina, the result is the opposite. As found by the District Court, Petitioner will be unable to continue his employment at all. During the period of heaviest expenditure for his defense, he will be utterly without income. It is this combination of complete loss of income and dramatic increase of cost, discussed *infra,* which will cause Petitioner's bankruptcy if the trial of this case is held in North Carolina.

Not only disruption of Petitioner's affairs and total loss of income are involved here. Trial of this case in the Eastern District of North Carolina will *double the cost of* Petitioner's defense. Current planning of the Petitioner's defense indicates that the defense team will include, throughout the trial of this case, a full-time staff of eight to ten persons. During a trial of this case in Raleigh, North Carolina, the Petitioner will be required to house, feed and provide office space and equipment for these persons.

Government and the Petitioner have indicated that they will call over 100 fact witnesses each. Petitioner also desires to call at least 25 character witnesses. It is not unreasonable to expect that the voir dire will be extensive as well since there has been substantial pre-trial publicity in this case. An estimate of less than 3 months under the circumstances is incredible.

On the other hand, if the trial is held in the Central District of California, the record shows Petitioner will receive outstanding amounts of assistance, including free legal assistance, lodging, meals, office space and secretarial help for the conduct of his defense there.[30] The result is that, if the trial is held in North Carolina, the cost of Petitioner's defense, estimated at $150,000 to $300,000[31] wherever the trial is held, will be catapulted to the astronomical and bankrupting sum of $300,000 to $600,000.

These figures and the 2 to 1 ratio of costs between the forums, is not based upon the mere speculative assessment of costs by counsel for the Petitioner. At the close of three days of pre-trial hearings in May, 1975, a detailed statement of expenditures was submitted to the District Court by affidavit, with a comparison for a projected equivalent period in Los Angeles. The figures speak for themselves; the three days in Raleigh cost $5,380.00, the same three days in Los Angeles would have cost the Petitioner $2,660.00.[32]

Of course, the demonstration of tremendous additional expenses may not, of itself, be sufficient to establish that a trial in the distant forum of the Eastern District of North Carolina will deprive the Petitioner of his right to due process of the law. When the

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[30] See pp. 7-8, *supra*. (History of Proceedings)

[31] See Appendix D which provides the estimated costs for Petitioner's defense for only one month of trial preparation and one month of trial. Here, again, a reliable estimate of the length of the trial is essential to a proper evaluation of Petitioner's claims.

[32] The Petitioner's affidavit was submitted in evidence to the District Court. It should be noted that these expenses included only those for presence of counsel and one law clerk.

additional burden is considered in light of the Petitioner's personal financial situation, however, the denial of due process and the abuse of discretion by the District judge becomes readily apparent.

In *Platt* v. *Minnesota Mining and Manufacturing,* 314 F.2d 369, (7th Cir. 1963) n.3, the Seventh Circuit held that the added expenditure of $100,000 for a multi-million dollar corporation was sufficiently large that a transfer was compelled. Significantly, there is no information given as to what percentage of 3M's defense this $100,000 cost would have constituted.

Dr. MacDonald, Petitioner herein, is not a multi-million dollar corporation, however. He does not even possess any unusual assets. Dr. MacDonald is a middle-class professional person with an automobile, a boat, a home and a mortgage on all three. The three and one-half years since his discharge from the Army did not result in the accumulation of a vast personal fortune. It is not difficult to see how the burden of trial in Los Angeles alone, costing between $150,000 and $300,000, will be overwhelming for a person with a net worth of only $36,000.

The comparison borders on the ludicrous when the tax aspects of these expenses are considered. For the corporate giant, 3M, its $100,000 expenditure in defending the anti-trust prosecution would have been wholly tax deductible. *Commissioner* v. *Tellier,* 383 U.S. 687, 86 S.Ct. 1118, 16 L.Ed 2d 185 (1966). This deduction would, therefore, reduce the next expenditure by 50 percent. For Dr. MacDonald, no part of his legal expenditures will be tax deductible. For a widowed person in Dr. MacDonald's personal income bracket, this will mean that, for every dollar neces-

sary to defend himself, he will be required to earn two dollars of gross income. Put more bluntly, trial of this case in the Eastern District of North Carolina will require the Petitioner, though wholly deprived income, to earn $600,000 to $1,200,000 to pay for his defense. Can there be any doubt that such a tremendous burden will bankrupt the Petitioner?

Yet, these factors received no consideration from the District Court. Though he concedes that the Petioner's personal expenses will be greater if the case is tried in the Eastern District of North Carolina, the District Court *did not even consider* the 2.1 ratio of costs or the impending personal bankruptcy of the Petitioner. It is important that the full impact of this action be clear to this Court. There was no finding contrary to Petitioner's uncontroverted evidence here. Apparently the District Court did not even consider it *worthy of mention* that his decision would result in a *doubling* of the cost of Petitioner's defense which would utterly bankrupt him.

2. Location of Counsel:

Failure to Transfer This Case Will Result in the Denial of the Petitioner of Effective Assistance of Counsel

The evidence presented to the District Court showed that, at the present time, it will be impossible for the Petitioner's Chief Counsel, Professor Bernard L. Segal, Esq., to continue as his counsel through an extended trial in the Eastern District of North Carolina.

Professor Segal has served as Chief Counsel to the Petitioner at every stage of this case over the past five years: from the commencement of the Army proceedings in 1970, through the three and one-half years of

efforts to obtain a final resolution of the matter from the Department of Justice, and throughout the current proceedings. Since his permanent move to California in 1972, Professor Segal has undertaken substantial professional commitments. Though these commitments will certainly be curtailed during the lengthy trial of this serious criminal case, they *cannot* be wholly abandoned. Trial in the Central District of California will mean that Professor Segal will be within easy commute distance of his offices, University and family in San Francisco.[33]

By comparison, if the case is tried in North Carolina, Professor Segal will be unable to maintain direct contact with his commitments, over a 3000 mile distance. Round-trip travel from Raleigh to San Francisco requires *two* days.[34]

This second abuse of discretion by the District Court is such that it may even rival his complete failure to consider Petitioner's impending bankruptcy. Here faced with the unrebutted representation by Petitioner's Chief Counsel, made under oath, that, under present conditions, he would be unable to continue as Chief Counsel if the case were tried in the Eastern District of North Carolina, the District Court again has considered this factor unworthy of mention. Instead of

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[33] Among the exhibits introduced before the District Court were a complete set of airline schedules for the alternate forums. The schedules for Los Angeles reflect that there are almost semi-hourly, round the clock, flights between Los Angeles and San Francisco. The round trip air fare is approximately $45.00.

[34] The airline schedules in evidence before the District Court reflect the fact that there are no direct non-stop flights from Raleigh to San Francisco, and that travel between the two cities is a bothersome, time consuming process. The round trip air fare between the two cities is approximately $380.00.

confronting the denial of the Petitioner's right to counsel which will be the undeniable effect of his decision, the District Court judge chose to engage in the fiction[35] that a local court rule of the Central District of California would prevent Petitioner from being represented by his Chief Counsel of five years if the case were tried there. The effect of the loss of Professor Segal upon the Petitioner's defense is made even sharper when considered in light of the situation of his only associate counsel who has a continuing familiarity with the case, Michael J. Malley, Esquire. Malley testified at length during the hearing on this matter regarding his personal availability in the case. He is currently employed by a law firm in Washington, D.C., where his practice involves government contract representation of corporate clients. Aside from brief experience under the military justice system five years ago, he has never practiced criminal law. While he has assisted in the case since its beginning as associate counsel, Malley cannot and will not accept the responsibility of Chief Counsel. His reasons for this are of the highest order and are entitled to be respected. He is a long-time personal friend of the Petitioner.[36] His personal feelings are very strongly involved in the case to an extent that he could not and should not function as Chief Counsel. Further, he has no significant experience in the trial of criminal cases, let alone a case involving a charge of triple homicide.

Yet, Petitioner did not rely on the loss of his Chief Counsel for five years as the sole basis for his allega-

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[35] The assertions of the District Court are incorrect both factually and legally. See pp. 11-12, *supra* (History of the Proceedings).

[36] Malley and Dr. MacDonald were roommates at Princeton University. Malley knew the deceased wife of Dr. MacDonald.

tion that he will be denied the effective assistance of counsel by the denial of his motion for transfer. The added expenditure of trial in the distant forum will undoubtedly inhibit the conduct of Petitioner's defense no matter who his counsel may be.

As Petitioner has shown by unrebutted evidence before the lower court, he has substantial offers of free legal assistance, clerical and secretarial help, and office space in the Central District of California, not to mention offers of free housing, feeding, and transporting witnesses. All of these services are essential elements in the conduct of the defense of a protracted, serious criminal case. They are more than mere conveniences; rather, they are *essential* elements in the preparation for and conduct of any important case. None of these services will be available to the Petitioner in the Eastern District of North Carolina without substantial additional expenditures. It is tragic indeed to contemplate the financial ruin and the short-changing of the defense of an accused who has already once proven that he has been wrongfully and falsely charged.

The consideration given this aspect of the Petitioner's motion by the District Court was largely illusory. Though the District judge briefly mentioned the costs of such items as office supplies and equipment in the Eastern District of North Carolina, he gave no mention or apparent consideration to the unrebutted evidence that the Petitioner may obtain these same services *free* in his home District. Of course, the services such as those discussed may be available in the offices of local counsel but evidentiary hearings were not required to determine that point. The District judge's discussion completely ignores that point. The District judge's discussion completely ignores that these serv-

ices will have to be *bought and paid* for in North Carolina,[37] at substantial added expenditure to Petitioner.

III. RELATIVE DOCKET CONDITIONS OF THE TWO FORUMS

The relative docket condition of the districts involved in a proposed change of venue is a factor which has been examined by appellate courts in cases involving writs to compel or halt interdistrict transfers. In the *Platt* case the Seventh Circuit pointed out that, for a valid comparison, a proper analysis must be made of the available statistics [345 F.2d 681, at 685-686 (1965)]. The court there, for example, criticized Judge Platt for using partial statistics as the basis for his decision to refuse transfer.

In the present case, the District Judge ignored the proper criteria, which had been included in the memoranda presented by the Petitioner, and evaluated this factor solely upon the "per-judge" caseload between the two districts involved. Uncontroverted evidence presented by Petitioner showed that the more accurate criterion by which to compare the two districts is the capacity of each district to handle its current criminal caseload. The statistic which offers the most accurate evaluation of this capacity is the length of time which the respective districts require to move a case from initiation to trial. In the latest report of the Administrative Office of the United States Courts,[38] the com-

[37] Petitioner does not consider the District Court's offer of a tiny, barren conference room in the federal courthouse as substitute for adequate office and secretarial space. Additionally, the utilization of this space would require Petitioner to conduct the preparation of his defense under the constant surveillance of government personnel.

[38] Administrative Office of the United States Courts, *Annual Report to the Director*, 1974, pp. A-56, 57; IX-108: amended portion, pp. A-56, 37; IX-108.

parative disposition time for criminal cases is: Central District of California: 4.3 months; Eastern District of North Carolina: 5.0 months (filing to disposition). The report further indicates that as a result of a 2.9% increase in filings during the last year, the disposition time in the Eastern District of North Carolina has increased by .7 months, or more than 8%. In contrast, filings in the Central District of California have dropped since 1973 by 2.6%.

An even more crucial criterion, however, is the comparison of judicial manpower in the two districts. The Central District of California has seventeen (17) judgeships and the Eastern District of North Carolina has only two (2). The effect of an extended criminal trial on the docket conditions in a two (2) judge district would be devastating. On the contrary, the Central District of California can readily adjust its caseload, even for the protracted three-month trial of this case. The District Court judge not only ignored these more reliable criteria, but also relied upon figures *which were prepared at a time when there were three (3) judges* in the Eastern District of North Carolina, neither mentioning nor giving any consideration to the fact that one of his colleagues, Chief Judge Butler, was to retire on July 1, 1975, *without replacement*. Once this information is considered in the balance, it is obvious that the Petitioner's trial will wreak havoc on the trial calendar of the Eastern District of North Carolina.[39]

[39] In footnote 2 of his memorandum opinion, the District Judge explains that "as a matter of courtesy" he communicated with Judge Hill, one of the judges of the Central District of California. The District Judge thereby received ex parte evidence out of the presence of the Petitioner and his counsel. This "evidence", which

IV. ACCESSBILITY OF PLACE OF TRIAL: LOCATION OF DOCUMENTS, RECORDS AND WITNESSSES

The facts and evidence demonstrating the relative inaccessibility of the Raleigh area when compared with the Los Angeles metropolitan area are a matter of record [40] and were uncontroverted in the District Court. Since it is wholly unsupported by the evidence and delivered without discussion, Petitioner is unable to determine the basis, if any, for the conclusion of the District Judge that Raleigh is more accessible to the parties and witnesses than Los Angeles.

The record reveals that within the immediate Los Angeles metropolitan area, there are four major airports. The combined traffic of these four airports is *ten times* that of the Raleigh-Durham airport.[41] The difference in accessibility of the two districts by air transportation was further demonstrated to the District Judge by the introduction of the official airline service schedule for each area. In quantity alone, there were *only four* pages of scheduled flights for the Raleigh-Durham area had no *less than thirty* pages of scheduled flights into the Los Angeles metropolitan area.

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was apparently given heavy weight by the District Judge, was not taken under oath, not subject to cross-examination, was self-serving and contradicted the clear weight of the evidence presented in Court by Petitioner. Petitioner strenuously objects to such an egregious violation of his constitutional rights.

[40] According to the figures provided by the *Federal Aviation Agency Statistical Handbook of Aviation*, Calendar Year 1974, there are more than 15 times as many passenger arrivals into Los Angeles as into the Raleigh-Durham airport. Table 4.7 of the Handbook also shows that the number of airplane departures for Los Angeles was approximately ten times that for Raleigh-Durham.

[41] *Ibid.*

In considering the convenience of the parties in this case, it must be noted that the primary Government attorneys are assigned to the Department of Justice in Washington, D.C. and will be attending the trial from Washington, D.C. There is also one assistant United States attorney who is assigned to the case from the office of the United States Attorney for the Eastern District of North Carolina, James Stroud, Esquire. Stroud, and Petitioner's local counsel, Durant Williams Escott, Esquire, are the only attorneys involved in this case who reside in North Carolina.

The inconvenience which will be incurred by the Petitioner if the trial of this case is held in North Carolina is discussed at length above. Likewise, there is discussion in an earlier section of the extreme inconvenience which trial in North Carolina will cause to Professor Segal, Petitioer's Chief Counsel.

Even the conclusion of the District Judge that trial in Raleigh would be more convenient to Mr. Malley in Washington, D.C. than trial in Los Angeles, is not supported by the facts in the record. Malley testified, without contradiction, and the record was supplemented by tables of airline schedules, that because of the infrequency of airline service, especially non-stop flights, between Washington, D.C. and Raleigh, that in fact it was more convenient for an attorney to fly from Washington, D.C. to Los Angeles.[42] The one to

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[42] Examination of the airline schedules submitted into evidence reveals the following: From Washington to Raleigh there are only five direct, daily flights, each approximately an hour in length. The earliest daily flight to arrive in Raleigh lands at 9:35 a.m. The latest to leave Washington departs at 6:30 p.m. One of these five flights leaves not from Washington but from Baltimore, nearly forty miles from the capital.

two hours flying time to Raleigh at inconvenient and infrequent times made the frequent five-hour non-stop flights to Los Angeles more convenient in general and in particular to him.

If Los Angeles is, as the evidence shows, the more accessible forum, the factors regarding the location of witnesses, documents and records are easily placed into perspective. Only a very small percentage of the known witnesses in the case are still residing within the Eastern District of North Carolina. Most of the innumerable fact witnesses connected to this case were in the Army at the time the murders were committed, and are now scattered all over the United States and in seven foreign countries. Essential character witnesses whom the Petitioner intends to call reside in the Los Angeles area.

Regarding the former Army personnel who have been transferred or discharged, the Los Angeles area is a highly accessible forum from all foreign countries and all parts of the United States. The Southern California area is the home of several major military air-

On the other hand, flying from Washington to Los Angeles there are 12 daily direct, non-stop flights departing Washington from all Washington area airports at all hours of the day and night. It is substantially easier for a busy attorney to schedule an appearance in Los Angeles following a full business day in Washington than it is for him to make the one available afternoon flight to Raleigh. The conclusion is inescapable that Raleigh is *less accessible*, even to a near neighbor such as the nation's capital, than is Los Angeles.

Additionally, insofar as the District Court weighed the relative accessibility of the Raleigh forum as an important factor in this action, he ignored Mr. Malley's testimony that he is required to do a substantial amount of travel in connection with his practice and will very likely be coming from an area such as Phoenix for the trial.

ports [43] to which military witnesses could be flown with relative ease for the Government. Raleigh, on the other hand, apparently has no scheduled direct flights from anywhere outside the continental United States, and only one nearby military airport, Pope Air Force Base. In a case such as this one, ease of scheduling is critical in minimizing the expense of transporting and lodging witnesses.

Of particular importance here are several of the proposed 25 character witnesses whom the Petitioner anticipates calling from the Los Angeles area. These witnesses are all professional persons with heavy scheduling commitments, who may be unable to testify if the trial is held in a distant forum requiring two or three days for their brief appearance. Yet the testimony of these witnesses is *vital* to the defense of the charges lodged against the Petitioner. To require such important character evidence in a serious case to be handled by deposition, as suggested by the District Judge, amounts to a callous disregard for Petitioner's right to a fair trial."

Regarding the documentary evidence in the case, the government has conceded that its documentary files occupy only two and one-half filing cabinet drawers. (See Affidavit of Kevin T. Maroney, dated April 22, 1975, Deputy Assistant General of the Criminal Di-

[43] Norton Air Force Base and North Island Naval Air Station both regularly receive large numbers of overseas flights from all parts of the world.

[44] In *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) stated: "*Certainly to fix the place of trial* at a point *where litigants* cannot compel personal attendance and *may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants.* 330 U.S. at 511. (Emphasis added.)

vision, Department of Justice, at p. 1.) However, the relevance of the location of the government's documents and records is dubious since the government has conceded, "(t)he government does not anticipate that documentary evidence will play any significant role in the proposed trial of this case." (United States' Response to Motion for Transfer, p. 10.) To whatever extent the location of government documents *not* to be used at trial may be relevant, Petitioner has voluminous files and documents in Long Beach, California and at the offices of his Chief Counsel in San Francisco, California. Petitioner further anticipates that requests will be made for documents located at such far-flung places as the Federal Records Center in St. Louis, Mo.

V. SPECIAL CIRCUMSTANCES REQUIRING CONSIDERATION

A. Effect of The Proceedings

As was set forth in the statement of the case earlier in this petition, the Petitioner has previously endured the emotional and financial, if not the legal, equivalent of a full trial on these charges. The Petitioner was formally charged with the murders of his wife and daughters and underwent a formal pretrial investigation under Article 32 of the Uniform Code of Military Justice (10 U.S.C. § 832). The Article 32 proceeding against the Petitioner was the longest in the 27-year history of the Uniform Code. Approximately 60 witnesses, including the Petitioner, testified in over 4 weeks of hearings. The expense to the Petitioner, despite the fact that he was provided with free office space, telephones, and other facilities, and some free legal assistance, was over $50,000. The Petitioner was confined a period of nearly five months.

At the conclusion of the Article 32 hearing, the charges against the Petitioner were determined by the

investigating officer to be *"not true"* and were finally dismissed in October of 1970. Because of the substantial calamities which he had suffered, the Petitioner was promptly granted an early release from the Army on hardship grounds. He received an Honorable Discharge.

As though one trial were not enough, however, the Department of Justice, five years later, has recommended the prosecution of the case. Although, following the dismissal of charges against him pursuant to the Article 32 proceeding, the Petitioner has continually sought, through personal visits and correspondence to obtain a final disposition of the matter, the Government failed to so act. The delay throughout that period had been *solely attributable to inaction by the Government.*

Despite the fact that high Justice Department officials had twice stated in 1974 that there were no evidence to warrant further prosecution, the Petitioner was indicted January 24, 1975, a few weeks before the statute of limitations expired this year. The indictment was brought solely to avoid threatened accusations of "cover-up" against the Department of Justice by Mr. Alfred Kassab, the step-father of the Petitioner's deceased wife, who, though he previously testified as a character witness for the Petitioner at the Article 32 investigation, had conceived an irrational hatred for the Petitioner. Motivated by this hatred, he filed "charges" with the Chief Judge of the Eastern District of North Carolina.

Though these "charges" contained no new evidence,[45] the Justice Department suddenly reversed its previous

[45] In fact, no new evidence has been produced since 1971.

position and convened a grand jury. The Department of Justice officials involved in the disposition of this case determined that their personal job security might be jeopardized by the Kassab accusations. It should be noted that at least one of the officials involved in the Justice Department's decision was also a key figure who testified at length before the Senate Watergate Committee. It is not difficult to understand the tremendous potential for political pressure which could be generated by someone such as Mr. Kassab in a case which has received highly sensational widespread press coverage for five years.

The burden imposed by the Government's needless and negligent delay in this case is too heavy for any court to ask Petitioner to bear. The defense of these charges will substantially impair the financial status of the Petitioner wherever the trial is held. But, trial in the distant and inconvenient forum of the Eastern District of North Carolina will bankrupt the Petitioner. Without question, this additional burden to Petitioner has been occasioned by the *Government's continued failure to act in this case.* It is too much to ask the Petitioner to bear the cost of defending himself twice against charges of first degree murder and also to force upon him the additional burdens which are *solely* attributable to the unconscionable Government delay in proceeding with this case. Yet, as is seen from a reading of the District Court decision, no consideration or weight whatsoever, was given to these very special elements of this case.

B. Effect of The Denial Upon Petitioner's Due Process Rights

A full examination of the merits of this motion will demonstrate that the nature and scope of the questions involved herein are of critical importance.

The rule that motions for transfer, in both civil and criminal cases, should normally be left within the discretion of the trial court is a long-standing one. Experience bears out the wisdom of this rule under normal circumstances. The interests at stake are normally insufficient to warrant special attention by the appellate courts. In our increasingly complex and highly mobile society, however, there will be an increasing number of prosecutions brought by the Federal Government, for reasons of convenience or otherwise, in a forum distant from the defendant's home, residence or headquarters of operations.

There are strong constitutional undercurrents of most fundamental nature which are unsettled by the procedure which allows the United States, the largest and most powerful Federal litigant, to defeat the motion for transfer by a defendant of ordinary means on trial for his life 3000 miles from home and the offices of his counsel, *without the slightest showing of inconvenience.* Put in terms of this case, the United States of America, with its innumerable resources, is able to compel Dr. Jeffrey R. MacDonald, a middle class California physician with a net worth of $36,000, to defend a charge of triple homicide in a forum on the opposite end of the country from his home where the extraordinary hardships of financial ruin and loss of chief counsel cannot help but occur. To force Petitioner to defend himself against these serious charges under these circumstances can be considered nothing less than a denial of due process of the law as guaranteed by the Fifth Amendment.

CONCLUSION

For all of the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BERNARD L. SEGAL
Suite 220
536 Mission Street
San Francisco, Calif. 94105

MICHAEL J. MALLEY
1250 Connecticut Avenue
Washington, D.C. 20036

Attorneys for Petitioner

Of Counsel:

DURANT WILLIAMS ESCOTT
412 Law Building
Charlotte, North Carolina

Dated: August 14, 1975.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
75-1681

In re:

JEFFREY R. MACDONALD, *Petitioner.*

Order

(Filed July 15, 1975)

On consideration of the petition for a writ of mandamus in the above captioned matter,

IT IS ORDERED that the petition be and is hereby denied.

For the Court—by Direction

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

APPENDIX B

Order on Motion to Transfer

[Filed May 30, 1975]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3

UNITED STATES OF AMERICA, *Plaintiff*

v.

JEFFREY R. MACDONALD, *Defendant*

ORDER ON MOTION FOR TRANSFER

The defendant, Jeffrey R. MacDonald, indicted in this court on three counts of first-degree murder, has filed ten pre-trial motions under Rule 12, F.R.Crim.P. The motions have been extensively briefed and argued before the court over a period of five days, and now ready for ruling is defendant's primary motion under F.R.Crim.P., Rule 21, for transfer of the case to the Central District of California for trial. The motion will be denied.

I.

TRANSFER PURSUANT TO RULE 21(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Defendant first moves that the case be transferred to the Central District of California for the convenience of the

parties and witnesses in the interest of justice under the provisions of Rule 21(b), F.R. Crim.P., which reads as follows:

> "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

The factors to be considered by the court in exercising its discretion on a motion to transfer under F.R. Crim.P. 21(b) have been listed in *Platt* v. *Minnesota Mining & Manufacturing Company*, 376 U.S. 240, 243-244 (1964), as follows:

1. Location of defendant.
2. Location of witnesses.
3. Location of events likely to be in issue.
4. Location of documents and records likely to be involved.
5. Disruption of defendant's business unless the case is transferred.
6. Expense to the parties.
7. Location of counsel.
8. Relative accessibility of place of trial.
9. Docket condition of each district or division involved; and
10. Any other special elements which might affect the transfer.

The murders with which defendant is charged occurred on February 17, 1970, at Fort Bragg, North Carolina, which is in this judicial district. At that time the defendant was serving in the Army as a medical doctor and was stationed at Fort Bragg. His permanent home was on the east coast, but about six months after his discharge from the Army in December of 1970 he moved to California, and for the last three and one-half years has maintained his residence at

Huntingdon Beach, California. He is employed at St. Mary's Hospital in Long Beach, California, as Director of the Department of Emergency Medical Services. In this position he performs certain administrative duties which account for just over half of his annual income of $60,000, the remainder of his income being for professional medical services personally rendered by him.

The defendant has alleged that if the cause is removed to the Central District of California, "he will be able to work continuously at his present position, including evenings and weekends when made necessary by in-court proceedings during the daytime," and the court is satisfied that the defendant could in fact continue to perform some of the services incident to his present employment, particularly in connection with his administrative duties. It is difficult to see how the defendant could practice medicine to any appreciable extent while engaged in the trial of the very serious charges which have been brought against him. The court has therefore concluded that a trial in this district would be more expensive to defendant in terms of lost income than would be the case if the trial were to be held in Los Angeles. It may also be assumed that the defendant's personal expenses in attending a trial in this district will be much greater than would be the case if the trial were were held near his home in California.

A consideration of the factors other than the personal financial hardship of the defendant has led the court to conclude, however, that the convenience of the parties and witnesses and the ends of justice do not require that the motion be allowed. A substantial number of the possible witnesses for the government and the defendant are located in the Eastern District of North Carolina, and there has been no showing that non-resident fact witnesses for either party live in or nearer to California than to North Carolina. The defendant proposes to call a number of character witnesses who reside in California and who have

known defendant since he moved to that state some three and one-half years ago, but it would seem that defendant's character witnesses in position to offer more pertinent testimony would be those who reside on the east coast and who knew the defendant prior to the date of the crime. The government has indicated it will consider stipulating the testimony of defendant's California character witnesses, and perhaps the matter can be handled by deposition.

The murders occurred at Fort Bragg which is in this district, and it is the court's understanding that the documents and records likely to be involved in the case are located in the office of the United States Attorney at Raleigh or in the Department of Justice at Washington, District of Columbia. The defendant has made no showing with respect to the location of any documents and records likely to be involved in the defense of the case.

Chief counsel for the defendant since the first charges were brought against him in 1970 by the military has been Bernard L. Segal, Esq., who at the time of the crime was a resident of Pennsylvania and a member of the bar of that state but who now resides in San Francisco, California, where he teaches in the School of Law at Golden Gate University. Although he apparently practices law in San Francisco, Mr. Segal is not a member of the California bar, and for this reason he would be precluded by Local Rule 1.3 of the District Court for the Central District of California from appearing as counsel for the defendant if the case should be removed to that court for trial.[1]

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[1] The rule provides for *pro hac vice* representation in a case by an attorney not otherwise eligible for admission who is a member in good standing of the bar of another state, but "unless authorized by the constitution or an act of Congress, an attorney is not eligible to practice pursuant to this paragraph if any one or more of the following apply to him: (i) he resides in California; or (ii) he is regularly employed in California; or (iii) he is regularly engaged in business, professional or other activities in California." Each of these condtions appears to apply to Mr. Segal.

Defendant's other retained counsel at this time is Michael J. Malley, Esq., who is a member of a Washington, District of Columbia, law firm. Obviously it will be more convenient for Mr. Malley to attend court in Raleigh which is not more than an hour away from Washington by air than it would be for him to attend court in Los Angeles.

While this is a Fayetteville Division case, the trial will be held at Raleigh which is connected by all forms of transportation with all of the principal cites in the United States including direct air connections to Los Angeles. It thus appears probable that Raleigh is more accessible to the parties and witnesses in the case than would be Los Angeles.

The condition of the docket of this court at this time is reasonably current, and the trial of this case can be commenced here within the next sixty days. Figures provided by the Administrative Office of the United States Courts indicate that the per-judge caseload in the Central District of California is considerably higher than the present per-judge caseload in this district.[2]

The court has considered several "other special elements" advanced by defendant as reasons for the proposed transfer, but these have not been deemed of sufficient merit to outweigh the reasons the government has advanced for retaining the case in this district. For instance, counsel for defendant predicts that the trial of the action may last from four to six months. In view of the fact that a full-blown hearing under Article 32 of the Uniform Code of Military Justice involving witnesses for the government

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[2] As a matter of courtesy the court communicated with Judge Irving Hill of the Central District of California to ascertain the present status of the docket there. He described it as "deplorable," and stated that if the case were transferred to that district and were not because of exigent circumstances accorded some unusual priority, it would be many months if not a year or more before it could be reached for trial.

and defendant required only four weeks of testimony, the court is of opinion that defendant's estimate of the trial time is not realistic. Defendant further contends that he will retain certain expert witnesses, "criminologists," to testify on his behalf and that such witnesses are more readily available on the west coast than in this area. It does not appear that he has retained any such witnesses, however, and there has been no showing that such experts, if needed by defendant, are not available in this area. Defendant alleges that it will be necessary for him and his attorneys to rent office space and furniture, purchase office supplies and equipment, lease telephones and have the assistance of perhaps as many as eight lawyers and law researchers, several investigators and several stenographers. Defendant has not yet retained local counsel to appear with his out-of-state attorneys, as it will be necessary under the Local Rules for him to do, but the court perceives no reason why the facilities of such local counsel when retained will not suffice for defendant's purposes.[3]

II.

Transfer Pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure

As a second ground for his motion to transfer it is alleged "that the defendant would suffer prejudice in the Eastern District of North Carolina in that a fair and impartial trial could not be obtained." This motion is made pursuant to Rule 21(a) which reads as follows:

> "The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."

[3] This court routinely makes available to counsel in protracted cases ample space in the courthouse for conferences and, if needed, secretarial space. A telephone may be installed at the party's expense, and the court's library, of course, is available to counsel.

The basis for defendant's motion is alleged prejudicial pre-trial publicity. The defendant has introduced clippings of numerous newspaper stories which appeared following the crime in February of 1970 and particularly during the course of the Article 32 proceedings which followed in the spring and summer of that year. The court has reviewed this material, and while it must be conceded that the crime was of a sensational character, the news stories for the most part appear to have been factual in nature and not designed to incite prejudice against the defendant. A substantial part of the publicity appears to have emanated from defendant himself and his attorney in numerous interviews granted by them to the news media. While the court has not seen or read all of this material, it seems safe to assume that it did not include inculpatory disclosures.[4]

More recently the publicity in this district has been the result of the grand jury proceedings which began in August of 1974. The defendant came here voluntarily and testified before the grand jury on two occasions, and on each occasion he submitted to interviews with the press and he and his attorney were regularly seen on newscasts over the

[4] The court is informed that on at least one occasion the defendant appeared on a national television program, and on the day before the hearings on defendant's motions began in this court there appeared in the Los Angeles Times a feature article of fifty-six column inches in length together with a large picture of the defendant. The material for this article was obviously furnished by the defendant, and in connection with the extensive news coverage of the bail reduction proceedings which were held in Los Angeles in February of 1975 it would seem that the publicity the case is receiving in California approaches that which it is receiving in this district.

local television stations. Following the court's admonition to counsel for the government and the defendant the press interviews appear to have diminished if not ceased altogether since the hearings on defendant's motions got underway, and while these hearings have been regularly reported in all of the news media, the reports of which the court is aware have consisted only of factual reporting of proceedings which occurred in open court, and it is not perceived that the news stories growing out of the grand jury proceedings or the hearings in this court have prejudiced the defendant's right to a fair and impartial trial in this district.

In sum, the court is not satisfied that there exists in the district so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, and in any event, it would be inappropriate to grant defendant's motion for transfer prior to the selection of a jury for the trial of the case. *United States* v. *Abbott Laboratories,* 505 F.2d 565 (4th Cir. 1974); *Wansley* v. *Slayton,* 487 F.2d 90 (4th Cir. Cir. 1973).

Accordingly, it is now

ORDERED:

1. That the motions of the defendant for transfer of the case to the United States District Court for the Central District of California for trial are denied;

2. That this case be transferred from the Fayetteville Division of this court to the Raleigh Division for trial; and

3. That subject to the rulings of the court to be made in the near future on defendant's remaining motions the case in set for trial in Courtroom No. 1, Seventh Floor, Federal Building, 310 New Bern Avenue, Raleigh, North Carolina, at 10:00 a.m. on Monday, July 14, 1975.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

May 30, 1975.

APPENDIX C

Financial Statement of Petitioner

JEFFREY R. MACDONALD

BALANCE SHEET

APRIL 30, 1975

ASSETS

Cash	$ 10,000.00
Automobile	8,000.00
Boat	18,000.00
Residence	75,000.00
Furniture and Personal Property	10,000.00
Pension Profit Sharing Plan	7,000.00
Listed Stocks	3,300.00
Land	1,000.00
TOTAL ASSETS	$132,300.00

LIABILITIES

Accounts Payable	$ 2,500.00
Note Payable, Bank of America, Secured by Boat	17,800.00
Note Payable, American City Bank, Secured by Automobile	1,200.00
Note Payable, California Federal Savings, Secured by Residence	28,000.00
Note Payable, Raymond Baker, Secured by Residence	10,000.00
Note Payable, Northwestern Medical School	6,500.00
Loan Payable, Diana Miller Decorator, Inc.	2,000.00
Legal Fees (Various)	18,300.00
TOTAL LIABILITIES	$ 86,300.00
EXCESS OF ASSETS OVER LIABILITIES	$ 36,000.00

JEFFREY R. MACDONALD

PERSONAL INCOME & EXPENSES

JANUARY 1, 1974 THROUGH DECEMBER 31, 1974

INCOME

Salary	$60,000.00

EXPENDITURES

House Payment (Includes Taxes & Insurance)	$ 5,300.00	
Boat Payment	3,400.00	
Auto Payment	1,200.00	
Income Taxes	10,800.00	
Loan to Northwestern University	900.00	
Insurance	700.00	
Non Reimbursed Business Expenses	5,000.00	
Medical	200.00	
Living Expense	25,000.00	
Normal Legal & Accounting	$ 4,000.00	$56,500.00
Excess		$ 3,500.00

APPENDIX D

Comparative Costs of Trial Statement of Petitioner Jeffrey R. MacDonald

COMPARATIVE COSTS OF TRIAL
(one month of trial and one month for pre-trial services/expenses)

LOS ANGELES VS. NORTH CAROLINA
1975

	North Carolina	Los Angeles	Savings in Los Angeles
Income Loss to Defendant	$10,000	—	$10,000
Fees			
Legal	40,000	35,000	5,000
Private Investigators (2)	4,000	4,000	—
Ten Expert Witnesses	3,000	3,000	—
Local Counsel	8,000	—	8,000
Typist and Clerk	1,500	—	1,500
Law Clerks (2)	2,000	—	2,000
Travel Costs			
Defendant	800	—	800
Mother of Defendant	1,200	—	1,200
Attorneys—Segal	2,400	300	2,100
—Malley	400	400	—
—2 Law Clerks	1,600	100	1,500
Private Investigators (2)	2,000	2,000	2,000
Expert Witnesses (10)	4,000	200	3,800
Character Witnesses	6,000	1,200	4,800
Fact Witnesses (60)	24,000	29,000	(5,000)
Living Expenses (Additional)			
Defendant	4,000	—	4,000
Mother of Defendant	4,000	—	4,000
Attorney—Segal	3,500	3,500	—
Attorney—Malley	3,500	500	3,000

COMPARATIVE COSTS OF TRIAL
(one month of trial and one month for pre-trial services/expenses)

LOS ANGELES VS. NORTH CAROLINA
1975

	North Carolina	Los Angeles	Savings in Los Angeles
Law Clerks (2)	6,000	2,000	4,000
Private Investigators (2)	3,500	3,500	—
Expert Witnesses	1,200	300	900
Character Witnesses	1,500	300	1,200
Fact Witnesses	6,000	4,000	2,000
Office Expenses and Miscellaneous			
Rental of Furnished Offices	1,500	—	1,500
Auto Rental (2)	2,500	—	2,500
Telephone	500	500	—
Paper, Xerox and Office Supplies	2,000	1,000	1,000
Court Reporter	4,000	4,000	—
	$154,000	$94,800	$59,800

APPENDIX E

Affidavit of Petitioner Sur Costs Incurred in Connection With Hearings on Pre-Trial Motions

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR. 3

UNITED STATES OF AMERICA

VS.

JEFFREY R. MACDONALD

AFFIDAVIT SUR COSTS INCURRED BY THE DEFENDANT IN CONNECTION WITH HEARINGS ON PRE-TRIAL MOTIONS IN SUPPORT OF DEFENDANT'S MOTION FOR TRANSFER
PURSUANT TO RULE 21(b) FED R. CRIM. PROC.

COST OF: 4 (four) days ..... DEFENDANT
4 (four) days ..... Mr. Segal
2 (two) days ..... Mr. Malley
5 (five) days ..... Ms. Simmons
3 (three) days ..... Mrs. Escott

I. FLIGHTS:
$ 380.00 ..... Defendant
$ 380.00 ..... Mr. Segal
$ 380.00 ..... Ms. Simmons
$ 75.00 ..... Mr. Malley
$ 40.00 ..... Mrs. Escott

TOTAL: $1,255.00

II. MEALS: ..... All of the above persons
TOTAL: $ 200.00

III. Rooms and Telephone ..... All of the above persons
Total: $ 325.00

IV. Car Rental ..... All of the above persons
Total: $ 100.00

V. Legal Fees:

$1,500.00 ... Mr. Segal, Chief Defense Counsel
$ 500.00 ..... Mr. Malley, Assistant Counsel
$ 500.00 ..... Mrs. Escott, Local Counsel

Total: $2,500.00

VI. Income Lost by Defendant:
Total: $1,000.00

TOTALS

In North Carolina		If Held in Los Angeles	
I.	$1,255.00	I.	$ 435.00
II.	200.00	II.	200.00
III.	325.00	III.	25.00
IV.	100.00	IV.	—
V.	2,500.00	V.	2,000.00
V.	1,000.00	VI.	—
	$5,380.00		$2,660.00

Differences In:
Expenses/Services for Less Than One Week—$2,750.00
(This Figure Does Not Include the Cost of Preparation)

I declare under penalty of perjury that the above is true and correct.

Dated: 5/7/75

At: Federal Court House Bldg., Raleigh, N.C.

/s/ Jeffrey R. MacDonald
Jeffrey R. MacDonald, Defendant
Crim. Case No. 75-26-Cr. 3

Nos. 75-173 and 75-240

Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-173 and 75-240

JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged with three murders committed in North Carolina, where he used to reside. He moved to transfer the case for trial in California, where he now resides. He now contends that the district court's order denying the motion to transfer is appealable and that the denial of transfer was an abuse of discretion.

On February 17, 1970, petitioner's wife and two daughters were murdered at petitioner's home in

Fort Bragg, North Carolina. Petitioner, then a Captain in the Army Medical Corps, notified the Military Police and told an investigating unit that four intruders had entered his quarters, attacked him, and killed his wife and children. An investigation failed to confirm this story; petitioner was charged with three specifications of murder, in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. After a military preliminary hearing, these charges were dismissed in October 1970 on the ground of "insufficient evidence to justify reference of the charges for trial by court-martial."

We have been informed by the United States Attorney that from December 1970 to January 31, 1971, the Army investigated petitioner's allegations that people involved in the earlier proceedings had committed criminal acts, including perjury and the destruction of evidence. The Justice Department then requested the Army to continue investigating the murder. In June 1972 the Army forwarded to the Department of Justice its voluminous reports of the investigation. The Department of Justice continued the investigation. In July 1974 the Department began presenting evidence to a grand jury in the Eastern District of North Carolina. On January 24, 1975, the grand jury indicted petitioner for murder, in violation of 18 U.S.C. 1111.[1]

[1] Contrary to petitioner's assertion (Pet. No. 75-173 at 38-40), the grand jury heard substantial evidence that had not been presented at the Army's hearing in October 1970.

On February 23, 1975, petitioner filed a motion, under Fed. R. Crim. P. 21, to transfer the case to the Central District of California, where petitioner had established a residence in the summer of 1971 (some 18 months after the murders). He argued that he could not obtain a "fair and impartial trial" (Rule 21(a)) in the Eastern District of North Carolina, and that a transfer was necessary "[f]or the convenience of parties and witnesses, and in the interest of justice" (Rule 21(b)). The court denied the motion (Pet. No. 75-173 App. B), and on July 1, 1975, the Fourth Circuit dismissed petitioner's appeal on the ground that an order denying transfer is not appealable (Pet. No. 75-173 App. A). On July 10, 1975, petitioner filed in the court of appeals a petition for a writ of mandamus to direct the district court to set aside its order denying the motion for a transfer.[2] The court of appeals denied that petition on July 15, 1975 (Pet. No. 75-240 App. A). Petitioner seeks review of both the July 1 and July 15 orders. Both petitions contest only the denial of relief under Rule 21(b).[3] However, there is no con-

[2] The district court also denied petitioner's other pretrial motions, including motions to dismiss the indictment on speedy trial and double jeopardy grounds. The court of appeals has stayed petitioner's trial pending appellate review of the denial of these motions.

[3] Rule 21(b) provides:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

flict among the circuits on any of the issues petitioner presents. Petitioner's contentions turn upon the rather unusual facts of his case, and he presents no question of general importance requiring review by this Court.

1. Petitioner contends (Pet. No. 75-173 at 12-22) that the court of appeals erred in holding that the district court's denial of his Rule 21(b) motion is not appealable. It is settled, however, that such an order is not a final judgment and is therefore not appealable. *United States* v. *Foster*, 296 F.2d 249 (C.A. 4); *United States* v. *Brown*, 301 F.2d 664 (C.A. 4); *Semel* v. *United States*, 158 F.2d 231 (C.A. 5); *United States* v. *Garber*, 413 F.2d 284 (C.A. 2); *Auerbach* v. *United States*, 347 F.2d 742 (C.A. 5), certiorari denied, 382 U.S. 958; *Holdsworth* v. *United States*, 179 F.2d 933 (C.A. 1). Cf. *United States* v. *National City Lines*, 334 U.S. 573, 594; *Parr* v. *United States*, 351 U.S. 513, 518.

Petitioner argues that his chief attorney would be unable to conduct his defense if the trial were to take place in North Carolina, and that a trial in North Carolina would be twice as expensive as a trial in Los Angeles, thereby exposing him to bankruptcy. Assuming *arguendo* (but see pages 7-11, *infra*) that these allegations are accurate, there is still no justification for treating the district court's denial of the Rule 21(b) motion as an appealable order. An interlocutory order does not become appealable merely because compliance may be costly. Nor can petitioner reasonably argue that representation by any lawyer other than

Mr. Segal would deprive him of effective assistance of counsel. It is true that petitioner will have to hazard a trial in North Carolina before he can appeal the district court's refusal to transfer his case; as this Court observed in a similar context, however, "bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship."[4] *Parr* v. *United States*, *supra*, 351 U.S. at 519-520 (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 325).

Petitioner's reliance on *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, is misplaced. *Cohen* involved a collateral order that could not be reviewed at all unless reviewed before trial. See *United States* v. *Ryan*, 402 U.S. 530, 533. The order in the instant case, by contrast, is but one step toward a final judgment; it will be reviewable at that point if petitioner is convicted.[5] Moreover, *Cohen*

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[4] Contrary to petitioner's suggestion (Pet. No. 75-173 at 18), the events that occur during the trial will provide an appellate court with additional information bearing on the question whether the denial of the motion to transfer was an abuse of discretion. Petitioner's argument that the district court abused its discretion is based in large part on his estimates (many of them disputed by the government) relating to factors such as the length of trial, the number and location of witnesses, expenses to be incurred, and so on. After trial, these disputed estimates will become known facts.

[5] *Cohen* also stressed (337 U.S. at 547) that the order at issue there presented a "serious and unsettled question" of law; the appealability question would have been differently decided, the Court stated, if the order involved (as it does here) merely an exercise of discretion.

was a civil case. This Court has stressed that piecemeal review is "particularly damaging to the conduct of criminal cases." *DiBella* v. *United States*, 369 U.S. 121, 124; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324-326. See *Berman* v. *United States*, 302 U.S. 211, 212-213. Petitioner argues as if the lack of pretrial appeal has deprived him of meaningful consideration of his contentions. But his arguments have been fully presented to the district court, which ruled against him. The Due Process Clause requires no more, for, as this Court has repeatedly held, there is no constitutional right to appeal, even on the merits of guilt or innocence, in a criminal case. *Ross* v. *Moffitt*, 417 U.S. 600; *McKane* v. *Durston*, 153 U.S. 684.

2. The court of appeals also properly denied the petition for a writ of mandamus. Mandamus will lie to review an interlocutory order in a criminal case only when the district court's ruling is not only incorrect but also outside the scope of its legitimate authority. See, *e.g.*, *Parr* v. *United States*, *supra*, 351 U.S. at 520-521; *Jones* v. *Gasch*, 404 F.2d 1231 (C.A.D.C.), certiorari denied, 390 U.S. 1029. Although petitioner argues that the district court has abused its discretion, he has not argued (nor could he) that the court overstepped its authority by requiring him to stand trial in the district in which the crime was committed.[6] The district court was

[6] Mandamus sometimes is appropriate to redress abuse of discretion, but this use of the writ is appropriate only when

entitled to determine (Pet. No. 75-173 App. 3a-8a) that petitioner should be tried in the vicinage of the crime. Although a trial in North Carolina would be more expensive to petitioner than one in Los Angeles (*id.* at 5a), the court held that petitioner's allegations of financial hardship are exaggerated[7] and that, in any event, the financial hardship to petitioner would be outweighed by other considerations.

The "location of events likely to be in issue" (*Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 244) is the Eastern District of North Carolina, the district where the crime was committed and

the court has issued an order for which there is no remedy by appeal. The Fourth Circuit itself has issued mandamus to correct an abuse of discretion during discovery (*Board of Parole* v. *Merhige*, 487 F.2d 25, certiorari denied, 417 U.S. 918). Mandamus might often be an appropriate remedy when invoked by the government, for no appeal from an erroneous acquittal is possible and mandamus may be a necessary device to preserve the government's rights under the Criminal Appeals Act. Petitioner's case is not an appropriate one for the use of mandamus to correct an abuse of discretion, however, because the propriety of the district court's decision not to transfer his case can be reviewed on appeal.

[7] With respect to petitioner's claim that he could continue with much of his work as a doctor if the trial were in Los Angeles, the court noted (Pet. No. 75-173 App. 5a): "It is difficult to see how [petitioner] could practice medicine to any appreciable extent while engaged in the trial of the very serious charges which have been brought against him." The court also found (*id.* at 7a-8a) that petitioner overestimated the likely length of the trial as well as the added expense in Raleigh of renting office space and equipment and hiring secretaries, stenographers, and expert witnesses.

where petitioner and his family lived at the time of the offense.[8] As the government informed the district court (Response to Motion for Transfer, p. 13), the prosecution desires the jury to view the scene of the crime (petitioner's former residence at Fort Bragg), which has been preserved since the crimes were committed. A jury view of those quarters will contribute substantially to an accurate understanding of the evidence in this case.

The district court also correctly concluded (Pet. No. 75-173 App. 5a-6a):

> A substantial number of the possible witnesses for the government and [petitioner] are located in the Eastern District of North Carolina, and there has been no showing that non-resident fact

[8] Petitioner has no constitutional right to be tried in Los Angeles simply because he established residence there subsequent to the crime. *Platt, supra,* 376 U.S. at 245. Indeed, the Constitution contains two provisions to ensure that a person be tried where the offense was committed. Sixth Amendment; Art. III, Sec. 2. We recognize that these provisions were written in an age of restricted travel and mobility. Their effect, therefore, was often to ensure trial at the place of defendant's residence. But this is not to say that a resident of one State who commits a crime there is entitled to be tried wherever he later chooses to reside. See Wright, *Federal Practice and Procedure (Criminal)* § 301, pp. 581-582 (1969):

> Those [on the Court] who have argued, sometimes for the majority and sometime in dissent, that the policy of the Sixth Amendment favors trial at defendant's residence would assert only that where it can reasonably be said that the offense was committed at the defendant's residence, this is where he ought to be tried.

> witnesses for either party live in or nearer to California than to North Carolina.[9]

With respect to petitioner's allegations that "*all*" (Pet. No. 75-240 at 13) of his character witnesses reside in California, the court observed (Pet. No. 75-173 App. 6a) that the "character witnesses in position to offer more pertinent testimony would be those who reside on the east coast and who knew [petitioner] prior to the date of the crime." Accordingly, Raleigh, North Carolina—"which is connected by all forms of transportation with all of the principal cities in the United States" (*id.* at 7a)—is quite possibly "more accessible" (*ibid.*) to the parties and witnesses than is Los Angeles.[10]

The docket conditions of the two districts involved also support the denial of the motion to transfer. The docket in the Eastern District of North Carolina per-

[9] The government informed the district court that, of the 108 prospective witnesses for the prosecution, 38 live in the Eastern District of North Carolina, 44 live outside of that district but in the Eastern time zone, and only 8 live in the Pacific time zone (Response to Motion for Transfer at 5-6).

[10] In an attempt to show the greater accessibility of Los Angeles (Pet. No. 75-173 at 34-38; Pet. No. 75-240 at 43-46), petitioner asserts (Pet. No. 75-173 at 36) that it is more convenient to commute between Washington, D.C. (where an associate defense counsel works) and Los Angeles than between Washington, D.C. and Raleigh. The flight time from Washington, D.C. to Los Angeles is about 5 hours. There are five daily nonstop flights from the Washington area airports to Raleigh and three daily "through" flights making one stop. The longest of these eight daily flights takes 2 hours and 30 minutes. Official Airline Guide, North American Edition (October 1, 1975), pp. 467, 718.

mitted the trial to be set for August 1975 (although its commencement has been stayed, at petitioner's behest, by the court of appeals). On the other hand, if the case were transferred to the Central District of California "it would be many months if not a year or more before it could be reached for trial" (*id.* at 7a, n. 2).[11]

Finally, petitioner's claim (Pet. No. 75-173 at 9, 17, 21, 22, 27-30; Pet. No. 75-240 at 9-10, 13, 16, 22, 24, 36-40) that the failure to transfer his case will make it impossible for Mr. Segal to represent him is unpersuasive. Indeed, Mr. Segal himself vacillates on this matter. Both petitions for certiorari assert that it would be impossible for Mr. Segal to conduct the defense if the trial is held in North Carolina. But petitioner's Motion to Transfer (p. 14) alleged only that a trial in North Carolina would

[11] Petitioner asserts (Pet. No. 75-173 at 34) that Chief Judge Butler, one of three judges in the Eastern District of North Carolina, retired on July 1 without replacement. We are informed that Judge Butler has resigned as Chief Judge but still is an active judge and plans to continue to hold court as frequently as before. Moreover, contrary to petitioner's assertions (Pet. No. 75-173 at 34, n. 20; Pet. No. 75-240 at 41-42, n. 39), it was entirely appropriate for the district court to communicate with Judge Hill of the Central District of California to ascertain the present status of the docket there. Judge Hill could properly take judicial notice of the time that would probably elapse before petitioner's case could be tried in Los Angeles; the district court below could properly rely on that information—especially because petitioner's statistics comparing the "disposition" time in each district are inconclusive for a number of reasons (such as the failure to take account of guilty pleas).

create a "substantial likelihood" that Mr. Segal would be unable to represent petitioner. And Appendix D to each petition asserts that the cost of a trial in North Carolina would include $2,400 for Mr. Segal's transportation and $3,500 for his living expenses. However that may be, Mr. Segal probably cannot represent petitioner in California should the case be transferred; Mr. Segal "is not a member of the California bar, and for this reason he would be precluded by Local Rule 1.3 of the District Court for the Central District of California from appearing as counsel for [petitioner] if the case should be removed to that court for trial" (Pet. No. 75-173 App. 6a).[12]

The district court's opinion reflects a careful and balanced consideration of the ten relevant factors

[12] Relying on *Munoz* v. *Hauk*, 439 F.2d 1176 (C.A. 9), certiorari denied *sub nom. Curtis* v. *Munoz*, 404 U.S. 1059, petitioner argues (Pet. No. 75-240 at 13) that attorneys in Segal's position have been allowed to appear in the Central District of California despite Local Rule 1.3. But *Munoz* involved a conflict among the district judges concerning whether a now-revoked local rule permitted attorneys residing in the Central District to appear *pro hac vice* if they did not maintain a law office in the district; the Ninth Circuit resolved the ambiguity in favor of the attorney seeking admission. The local rules were amended and now clearly prohibit Segal's appearance on three independent grounds. Because of Local Rule 1.3, Segal was recently not allowed to appear as petitioner's counsel of record in a bail reduction hearing before a Magistrate in Los Angeles, even though the government consented to Segal's appearance at that hearing. Although it is conceivable that Mr. Segal could persuade the Ninth Circuit to relieve him of the effect of Local Rule 1.3, such proceedings could take many months, making trial in California still less attractive compared to the prompt trial available in North Carolina.

articulated in *Platt, supra*, 376 U.S. at 243-244.[13] The district court's refusal to transfer was a proper exercise of its discretion; no exceptional circumstances exist to justify relief at this stage of the proceedings.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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[13] Petitioner's allegations that the court failed to appreciate important facts are unpersuasive. For example, petitioner states (Pet. No. 75-240 at 15) that the district court erred in finding that he had not retained local counsel to appear with his out-of-state attorneys. But the point of the court's reference to petitioner's failure to use local attorneys was that local counsel would help reduce petitioner's expenses. Similarly, there is nothing to indicate that the district court "ignored" petitioner's claim (Pet. No. 75-240 at 16) that Segal would be unable to represent him in the Eastern District of North Carolina. The court's opinion (Pet. No. 75-173 App. 6a) simply emphasized the more important consideration—that the Local Rules of the Central District of California clearly prohibit Segal's appearance *there*.

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